WHAT ARE DECREES *IN PERSONAM?*

FANCY an Englishman who owns the Vendome and concludes to buy the Brunswick also. Price is agreed, proper sale contract duly executed. The price is to be a million cash. Vendor's plans and programme for future business arrangements change of course; but the Englishman changes his notion, stays at home in London, runs his Vendome by agents, lessees, etc., becomes contrary and obstinate, and finally refuses to do a thing, and defies the vendor.

What can the vendor do about it? It is annoying to see his promisor and business rival enjoying the rents and revenues of a two-million-dollar hotel near by, without even sneaking its title into the name of a wife or brother-in-law, while said rival repudiates his contract duty, shelters his *personam* under the Meteor Flag, and enjoys full Massachusetts protection of his property. But what can vendor do about it?

The only complete justice for vendor is to get his price. Since Old Colony Railroad *v.* Evans,[1] a lawsuit will not give him the agreed million, but only a verdict for excess of price over value, no great sum when intelligent parties are dealing. We need not now speak of possible depreciations, so, if there is no jurisdictional stumbling-block in the way, vendor ought to have specific performance of the contract decreed by an equity court, and to have his contract price decreed to him, collectible by execution, for of course he will have attached the Vendome in his equity suit.

The attachment gives jurisdiction of the *lis*, opens a door to some possible relief. How much and what relief will depend upon how far the right arm of the Commonwealth reaches. Of that hereafter. We will suppose all the citations, etc. required by the equity rules in a suit against a non-resident duly given.

We may say, in passing, that it is the clear policy of the Commonwealth to aid its citizens against the misdeeds and defaults of foreigners to the utmost of its power. Its execution seizes the foreigner's property here, though the judgment has no extra-state force. Before a foreign guardian of a foreigner can carry off per-

[1] 6 Gray, 25.

sonalty, he must get a license, which will not be granted if a citizen creditor object, and even a bonded resident guardian of a foreigner cannot carry off his personalty except on conditions imposed in Probate Court, after public notice, etc. Laws of personal arrest exist against a foreigner who "intends to leave the State." Non-resident executors, foreign express companies, insurance companies, etc., must have a resident agent to receive service of process. Support of a non-resident wife may be decreed here without any attachment.[1] If a foreigner has or pretends a cloud over Massachusetts land, our courts dissipate the cloud, without any personal jurisdiction over or service upon the foreigner.[2] They sequestrate unattachable property of a non-resident in favor of a citizen creditor. The Legislature has also invented a conveyance by "a suitable person" under direction of an equity court when a foreigner has any interest in any realty or personalty, a wood-lot or a cow, which by any trust express, written or oral, or even only implied, ought (or any interest therein) to be conveyed to a citizen (P. S., ch. 141, sec. 22). Further illustration is not necessary. It is plain that every effort should be made to aid the citizen against the wrong-doing foreigner.

If our client were vendee of the Brunswick and held the Englishman's bond to convey him the hotel, vendee would succeed under the above section 22, and the "suitable person" would execute a deed to him.[3] But the court does not think a vendor can get relief under section 22.

Does he need it? He now holds the whole legal title to this Massachusetts hotel, and has facilities which a vendee has not. He does not need to ask so much of the court. Perhaps he can be helped to what is right and equitable without any decree *in rem*, and without any decree ordering the Englishman's *personam* to do anything. Perhaps his own full legal title may be modified, marshalled, or conveyed, he being willing and ready so to do. Perhaps such modification may be offered or tendered, which is all equity would seem to care about, so as to accomplish all the equitable preliminaries that a vendor ought to offer in order to entitle him to an execution for his cash price. There is no doubt that the Commonwealth dealing with its own land can authorize such tender in a bill in equity against an absent foreigner, and make it equivalent to full performance by vendor of all preliminaries due from him.

[1] Blackinton *v.* Blackinton, 141 Mass. 435.

[2] Short *v.* Caldwell, 155 Mass. 57.

[3] Felch *v.* Hooper, 119 Mass. 52.

It does not follow that her courts can. They may have no equitable jurisdiction at all, so we have to inquire whether the vendor's own control of the legal title suffices. He therefore brings his bill, not for legal damages, but for true equitable relief, *viz.* full specific performance, tenders in his bill, and places on file a correct deed of the Brunswick, asks the approval of his action by the court as and for a performance on his part of his whole duty, and an order of execution for his price. Such approval must be by decree, and we are brought to the question whether this decree is objectionable as being *in rem*, or as being such a decree *in personam* as must not be made against a foreigner.

Well, it is not *in rem*. The court conveys no title. The plaintiff alone does whatever looks in that direction, and places with the clerk the title of the Brunswick for the acceptance of the Englishman. The court merely inspects, sees that the plaintiff is fairly doing what devolves upon him to do, as it would verify the performance of any other preliminaries, puts its determination in form of a decree, orders the clerk to hold the deed for defendant's acceptance (if he ever claims it) and to issue execution for the cash. Perhaps the title does not pass at all. Perhaps it never does by any tender. It is not material to the principles of equity that the title should actually vest in the Englishman, but it is material that the plaintiff should do his duty by tendering. The actual title might not pass if the foreigner had been caught on the wing in a transit across Massachusetts by a personal tender and citation. Yet in that case the court would certainly act, and its jurisdiction over subject and person would be unquestioned.[1] Jailing for contempt is not accepting the filed deed, and is not available after the foreigner's aforesaid transit has been completed. In short, does equity really care whether he accepts or not? We will inquire by and by. But in Merrill *v.* Beckwith,[2] the court considered that it could not "compel him to accept a conveyance," and, the suit being *in personam*, "could not bind him personally by its decree."

This brings us before long to the question of much practical interest to vendors: Is any acceptance necessary? Is any decree to accept necessary? Is it necessary to bind the foreigner personally to anything in our hotel suit brought by a vendor?

We shall not discuss suits to compel a foreign vendor to execute a conveyance, which would be an act of power *in personam*, and to

[1] Thompson *v.* Cowell, 148 Mass. 552.

[2] 163 Mass. 505.

compel action, activity, *in personam*. Such cases are Spurr *v.* Scoville,[1] Moody *v.* Gay,[2] etc. We discuss only a vendor's bill, and no action or signature of defendant is wanted.

It is true that no decree *in personam* can be made when there is such jurisdiction as the Vendome attachment gives? Is it not more scientific to say that no decree compelling activity of the foreigner can be made? Is there not in this regard a vital distinction between decreeing against a defendant who is to be passive and one who is to be active? In Spurr *v.* Scoville he would have to be active, i. e. execute and acknowledge a deed, and Judge Fletcher there says the court will, if there are other parties in same cases "proceed against those other parties, and if the absent parties are merely passive objects of the judgment, a complete determination may be obtained." Sir Thomas Plummer[3] says: "Not having them before the court, *though their rights may be bound*, there is a difficulty in making them act. The plaintiff requires specific performance of the agreement, supposing it proper for a few to execute the lease in behalf of the rest. In a conveyance of the interest, all must join. But that difficulty presents no objection to *binding the rights of the parties not before the court.* That is authorized in every one of the cases referred to, If the court cannot proceed to compel the defendants to do the act required, it must go as far as it can." This is the doctrine of Judge Story[4]: "The absent party cannot be compelled to do any act. But if the disposition of the property in controversy is in the power of the parties, the court may act upon them and through them upon that property." And in Fell *v.* Brown[5] the Chancellor says: "I admit the distinction has been taken as to proceeding in the absence of parties abroad, between their being active or passive parties." Well, our vendor is content to have the Briton passive, — under the court's approval puts his deed of the Brunswick on file for defendant's acceptance, — asks no decree which shall make the defendant act, sign, or do, only a determination by the court that vendor has done his duty, and its permission, not order, to defendant to take the deed from the clerk; and all this not as a record to have extra-territorial force, but as a determination of preliminaries to the end that a cash execution against attached Massachusetts property may issue.

By English practice this can be done, the hotel being within

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[1] 3 Cush. 578.
[2] 15 Gray, 457.
[3] Meux *v.* Maltby, 2 Swanst. 277.
[4] Eq. Pl., sec. 81–87.
[5] 2 Bro. Ch. 276.

jurisdiction, and a citation to be served out of jurisdiction is allowed. Judge Aldrich calls this practice an improvement upon ours, and thinks "it would be no great enlargement of the rule of relief laid down in Felch *v.* Hooper against a foreigner, for the court to decree, in accordance with the English rule, specific performance of a contract concerning land within jurisdiction, although the defendant should be out of jurisdiction and never had been within it."[1]

Some questioner may ask, "Does all this transfer the Brunswick title to the Englishman? Can a man be made a landowner without his acceptance?" We have alluded to this, and should even incline to agree with the questioner, but shall not do so quite yet, because of the opinion of Shaw, C, J., in Concord Bank *v.* Bellis[2]: "A good conveyance may be made by deed poll to an infant, lunatic, or feme covert (1852), although such grantee would be under legal disability to convey. It is true that in theory of law the grantee in a deed poll is held to be a party by accepting the deed, but the deed does not derive its efficacy as a grant and conveyance from the act of the grantee in accepting, but from that of the grantor in executing it. In case of a plain, absolute conveyance without conditions, either no special acceptance is necessary to give it effect, or what is nearly the same thing, the acceptance of the grantee will be presumed. So the delivery of the deed to a third person (the clerk), unconditionally, for the use of the grantee, gives effect to the deed."

But was it ever supposed that the actual acceptance by a recalcitrant vendee of a tendered deed was an essential preliminary to the enforcement of vendor's rights? If so, farewell to all redress against foreigners; — yes, and frequently against citizen vendees too, for they can leave as the decree approaches, or if in jail for contempt still refuse to accept if sufficiently angry. The court cannot compel acceptance by the foreigner, — it can only permit. Even where personal citation is made (on the foreigner in transit) and when the personal jurisdiction is clear,[3] all attempt to compel acceptance would be futile. Did any one ever hear of a court trying to compel actual acceptance by foreigner or citizen of either deed or money? Does any one care whether he accepts or not? Certainly phrases occur about "compelling acceptance,"[4] and we

[1] Aldrich, Eq. Pl. & Pr. 44–46.

[2] 10 Cush. 278.

[3] Thompson *v.* Cowell.

[4] Richmond *v.* Gray, 3 Allen, 27–31; Park *v.* Johnson, 7 Allen, 383.

cannot tell whether they mean any more than a *forma arguendi*, for it is the relief to a plaintiff that is argued about. Such expressions, or order that a defendant accept something, may have even crept inadvertently into some decrees for specific performance, and would carry little weight; but in a cursory search we find few such, and their absence in others is very significant. In Seton, 696, plaintiff purchaser is decreed to be "at liberty to pay into court —— pounds to the credit of the cause," and the premises shall be conveyed to him. That is all. The leading case, Felch *v.* Hooper, which reached a decree in 4 Clifford, 493, does not compel defendant vendor to accept the money, and there is no more legal need for vendee to accept a deed than for a vendor to accept the money. In the statute, P. S., ch. 141, sec. 22, under which Felch *v.* Hooper was decided, there is no anxiety manifested that the foreigner shall accept the money due him by the enforced contract, nor any means provided for the court to make him do so, and the court does not try to, but of course, as of simple equity, requires the plaintiff to deposit it, and would permit defendant to take it. It must do this much to do equity, and in such permissive decree makes no decree inadmissible *in personam*, violates no constitutional rights of the non-served non-resident, and no greater decree than this is wanted in our Brunswick case. Would it not be rather ludicrous for an equity court to distress itself, whether the foreigner ever did take the deed or the money from the clerk? Would it not be a grave defect in the administration of equity to suffer his neglect so to do to bar the rights in Massachusetts land of a vendor who has done his whole duty? The text-books say that even inability of vendor to make perfect performance shall not bar the plaintiff's right to an imperfect performance if he wants it. The default, inability, or refusal of a defendant must not prejudice the plaintiff. In brief, the cause invokes relief for a plaintiff. He alone prays any. Of course he must do equity, that is, if vendee, pay into court, — if vendor, file a deed; and it is wholly immaterial whether the defendant ever accepts either, — from which it follows that a decree against the Englishman should not order him to accept the deed. The court is merely requiring a plaintiff "to do equity," and, if there be no court or case, the plaintiff has done his duty when he tenders a correct deed.

It would seem, then, that in our Brunswick case, and also in cases of personal citation, the decree should not "compel ac-

ceptance" by the defendant; and the quoted remarks of the distinguished jurist in Merrill *v.* Beckwith, though weighty of course, are too brief to be a discussion.

The questioner may still say, "But passing the question of compulsory acceptance, has the court any jurisdiction even to say that the uncited foreigner *ought* to accept and perform?" The answer is, "Yes, just so far as the attached Vendome represents him, — just so far as at law to say he ought to pay a debt out of the attached property."

But Judge Fletcher (Spurr *v.* Scoville) says, "The person named as defendant is not before the court, nor within its jurisdiction, and the attachment can avail nothing in this case." That was so because the relief sought there was to compel a defendant to execute a deed. But is it true that, where an attachment of the Vendome exists capable of satisfying the whole equitable claim for the cash relief, that there is no *lis pendens* at all? If so our contention is extinguished. Has the court no power to help the plaintiff? If so, why our attachment laws and provisions for constructive notice to absent defendants? How is it at law in the collection of debts against foreigners? Is there really no *lis?* A lawsuit is started on a foreigner's bond, his realty attached, and the statute notices duly given. He is defaulted. Why? Judgment for the penal sum for breach of the bond is entered upon said default. Then follows an *ex parte* hearing to see how much "equity and good conscience" shall say ought to be paid. Here is a jurisdiction concerning the absentee's duty. This hearing is by the court, and sometimes by a jury, if anybody wants a jury, and later execution is awarded. All this looks like a *lis pendens.* It is a *lis pendens,* with the peculiarity that the relief is enforceable only out of the attached property. It is not a proceeding *in rem.* The *res* is the Brunswick. The attachment is on the Vendome. Thus there are judgments *in personam* which are unobjectionable, even if the *persona* is out of jurisdiction. So there are equity decrees against foreigners equally unobjectionable; e. g. in case of attachment of property here belonging to a foreign trustee of cash funds. The lawsuit above is then a suit *in personam* with relief qualified. The names of two parties appear in the docket and record. In Boyd *v.* Urquhart *et al.*, Judge Sprague styles the proceeding "a libel *in personam.*" No process on Urquhart *et al.* was served, as they were out of jurisdiction. An attachment of a vessel was made. Judge Sprague says it is no process *in rem,* and he ascer-

tained the amount due libellant, and ordered it paid out of the attached property, and costs too.[1]

All these advantages and means resulting from attachments are by statute available in an equity suit. Sometimes they will suffice for full relief, as in our Brunswick case, and relief of an equitable nature, viz. price, not damages. Of course in Spurr *v.* Scoville they would not, but it will never do to say that our vendor attaching the Vendome has not a *lis* in which something can be done, nor to say there is no jurisdiction. Clearly there is a qualified jurisdiction explained in Boyd *v.* Urquhart and in Eliot *v.* McCormick,[2] and the citizen has the right to have it exerted if and when it will avail him. If he were suing on a bond as above, all the preliminaries, "equity hearing" and all, will be determined by the tribunal before ordering execution. If his suit is in equity against the Englishman vendee, all the steps — style of deed, approval, order that the clerk hold it for defendant's use, etc. — should be passed upon by the court's decree, as in ordinary suits against a cash vendee. Nothing is required or compelled from the activity of the foreigner, and finally execution for the contract price is ordered and exact relief attained. Here the attachment jurisdiction is not futile and irrelevant, as in Spurr *v.* Scoville, but real and complete. Is not this programme sound in principle?

T. M. Stetson.

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[1] Sprague's Dec. 423. [2] 144 Mass. 10.

NOTE. — A glance forward indicates that the above doctrine may perhaps have wider application than to sales for cash. Most sales of realty contemplate a return mortgage of it, and it may be thought difficult to compel a foreigner (without personal service) to execute such mortgage. But the deed poll of the above article is to conform to the contract of sale. Properly drafted, it can create in favor of the grantor a lien for the purchase money exactly identical with a mortgagee's lien or title. In fact, such is a favorable method in several States for creating the desired status, viz. converting grantor into a mortgagee, and grantee into a mortgagor. The lien thus reserved to grantor is declared by Mr. Justice Bradley to "equal a mortgage taken contemporaneously with the deed, and nothing more, and the purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase money." King *v.* Y. M. A., 1 Woods, 386. The name of the topic in the books relating to this mode is "Vendor's Lien by Contract or Reservation." See Jones on Mortgages, sec. 229–240, Ogden *v.* Ogden, 4 Ohio St. 182, and the situation "differs in no respect from a technical mortgage." The formal variation from the mortgage signed by vendee to such deed poll is justified by defendant's breach of contract, and is in no sense material in equity. It is formal only, and changes even of substance are often justified in cases of specific performance where the doctrine of *cy pres* prevails, as well as in charity cases. (See many cases in Fry, S. P., sec. 667–674.) Such deed poll is an equitable equivalent for the deed and mortgage, just as in a contract of sale, where vendee is to give back a lease for one year, the deed poll may reserve the one year use.